

STATE OF MICHIGAN
IN THE SUPREME COURT

INNOVATION VENTURES, LLC, d/b/a LIVING
ESSENTIALS,

Plaintiff-Appellant,

v

LIQUID MANUFACTURING, LLC., K & L
DEVELOPMENT OF MICHIGAN, LLC, LXR BIOTECH
LLC, ETERNAL ENERGY, LLC, ANDREW KRAUSE,
and PETER PAISLEY,

Defendants-Appellees.

Supreme Court No. 150591

Court of Appeals No. 315519

Oakland County Circuit Court
No. 12-124554-CZ

**BRIEF OF AMICUS CURIAE
MICHIGAN CHAMBER OF COMMERCE**

Richard C. Kraus (P27553)
David R. Russell (P68568)
Foster, Swift, Collins & Smith, P.C.
Attorneys for Michigan Chamber of Commerce
313 S. Washington Square
Lansing, MI 49833-2193
(517) 371-8104

December 22, 2015

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
STATEMENT OF QUESTIONS PRESENTED.....	iv
STATEMENT IDENTIFYING INTEREST AS AMICUS CURIAE	1
STATEMENT OF POSITION AS AMICUS CURIAE	1
ARGUMENT	4
I. A party’s exercise of its rights under an agreement cannot result in a failure of consideration and render other contract provisions unenforceable.	4
A. Failure of consideration cannot be based on an event that was contemplated by the parties and governed by an agreed upon provision in their contract.....	4
B. A court should not use failure of consideration to protect a party against the consequences of contract terms it knowingly accepted.....	9
C. Courts should not inject uncertainty into unambiguous contracts.	13
CONCLUSION	15

INDEX OF AUTHORITIES

Cases

<i>Adell Broad Corp v Apex Media Sales, Inc</i> , 269 Mich App 6, 12; 708 NW2d 778 (2005)	5, 7, 13
<i>Balogh v Supreme Forest Woodmen Circle</i> , 284 Mich 700, 707; 280 NW 83 (1938)	11
<i>Bloomfield Estates Improvement Ass’n, Inc v City of Birmingham</i> , 479 Mich 206, 212; 737 NW2d 670 (2007)	11
<i>Brown & Brown, Inc v Mudron</i> , 379 Ill App 3d 724; 887 NE2d 437, 441 (2008)	14
<i>Central Adjustment Bureau, Inc v Ingram</i> , 678 SW2d 28, 35 (Tenn 1984)	13
<i>Curtis 1000 v Suess</i> , 24 F3d 941, 946 (CA 7, 1994)	9, 11
<i>GMC v Dep’t of Treasury</i> , 466 Mich 231, 239; 644 NW2d 734 (2002)	5
<i>Kefuss v Whitley</i> , 220 Mich 67, 82-83; 189 NW 76 (1922)	12
<i>Labriola v Pollard Group, Inc</i> , 152 Wash 2d 828, 838; 100 P3d 791, 796 (2004)	6
<i>Lafayette Dramatic Productions, Inc v Ferentz</i> , 305 Mich 193, 215-218; 9 NW2d 57 (1943)	12
<i>Levitz v Capitol Sav & Loan Co</i> , 267 Mich 92, 97; 255 NW 166 (1934)	5
<i>Lichnovsky v Ziebart Int’l Corp</i> , 414 Mich 228, 240-241; 324 NW2d 732 (1982)	4, 8
<i>McCarty v Mercury Metalcraft Co</i> , 372 Mich 567, 574; 127 NW2d 340 (1964)	6
<i>QIS, Inc v Indus Quality Control, Inc</i> , 262 Mich App 592, 594; 686 NW2d 788 (2004)	5, 6
<i>Rory v Cont’l Ins Co</i> , 473 Mich 457, 468; 703 NW2d 23 (2005)	2, 5, 11
<i>Rosenthal v Triangle Development Co</i> , 261 Mich 462, 463; 246 NW 182 (1933)	6, 7, 8
<i>Sharrar v Wayne Sav Ass’n</i> , 246 Mich 225, 229; 224 NW 379 (1929)	6
<i>Simko, Inc v Graymar Co</i> , 55 Md App 561; 464 A2d 1104, 1107-1108 (1983)	6, 14
<i>Summits 7, Inc v Kelly</i> , 178 Vt 396; 886 A2d 365, 370 (2005)	5, 9, 13
<i>Sunday v Novi Equipment Co</i> , 290 Mich 539; 287 NW 909 (1939)	7
<i>Wilkie v Auto-Owners Ins Co</i> , 469 Mich 41, 52; 664 NW2d 776 (2003)	2

<i>Zemco Mfg, Inc v Navistar Int'l Transp Corp</i> , 270 F3d 1117, 1121 n 3 (CA 7, 2001)	6
--	---

Other Authorities

15-80 Corbin on Contracts § 80.23	11
2-6 Corbin on Contracts § 6.19	11
Black's Law Dictionary (5th ed)	7
Black's Law Dictionary (8th ed)	5
Restatement Contracts 2d, § 237	6

STATEMENT OF QUESTIONS PRESENTED

The order granting leave to appeal directs the parties to address “whether the Nondisclosure Agreement and Equipment Manufacturing Agreement are void due to failure of consideration.” [Order 7/1/15]

The Michigan Chamber of Commerce believes the Court of Appeals erred by holding that the non-compete and non-disclosure provisions in the agreements between Innovation Ventures and K & L Development were unenforceable due to failure of consideration because Innovation Ventures terminated the contracts as permitted by the terms negotiated and accepted by the parties.

The Chamber does not take a position on the other issues identified by this Court or raised by the parties.

STATEMENT IDENTIFYING INTEREST AS AMICUS CURIAE

The Michigan Chamber of Commerce was granted leave to participate as amicus curiae. [Order, 4/7/15]

The Michigan Chamber of Commerce is a nonprofit corporation representing over 6,800 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan. Since its founding in 1959, the Chamber has sought to engage decision-makers at all levels of government with the hope that the continual development of law and public policy will keep Michigan economically competitive and make the State attractive as a place to live and work. With this goal in mind, the Chamber has participated in lawsuits to ensure that courts are aware of how business is conducted in Michigan and are mindful of the impact court decisions have on the business operations and economic development in this State.

STATEMENT OF POSITION AS AMICUS CURIAE

The Court of Appeals held that a party's decision to terminate a contract—an action expressly permitted by the agreement—resulted in a failure of consideration. As amicus, the Chamber submits that exercising a contractual provision accepted by both parties should not render other terms in the agreement unenforceable. The Court of Appeals' interpretation and application of the failure of consideration doctrine, unless reversed by this Court, will threaten the stability of contractual relationships between companies doing business in Michigan.

The decision is especially troubling because the business arrangements among Innovation Ventures, Liquid Manufacturing, and K & L Development are fairly common.

A business has a product it wants to sell, or in some cases, the idea for a product that it hopes to sell. In this case, Innovation Ventures developed 5-Hour Energy, a specialized drink that has been extraordinarily successful. While a company may have considerable expertise and knowledge about its product and the marketplace, it may need to seek out help in other operations, such as manufacturing or processing. To accomplish its business objectives, the company will contract with a manufacturer or processor that has the needed facilities, equipment, personnel, and expertise. Liquid Manufacturing filled that role for Innovation Ventures by agreeing to provide bottling services. Depending on the circumstances, there may be a need for assistance in other areas. For example, a consultant with specialized knowledge about adapting the manufacturing process to the specific product may be brought in to serve as an interface between the product company and the manufacturer. Here, Innovation Ventures retained K & L Development to help design and install the customized equipment and processes for producing 5 Hour Energy.

It is essential that businesses have the ability to determine what is needed to get the job done, what is the best way to pool their expertise and resources, and what contractual arrangements are acceptable to all parties. And, it is just as essential that businesses can depend on the contracts they negotiate and execute. This Court has frequently stated the bedrock principle: courts should respect “the freedom of individuals freely to arrange their affairs via contract” by enforcing their agreements as written. *Rory v Cont'l Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Businesses in Michigan rely on that “ancient and irrefutable” principle when planning their operations, committing their resources, and investing in their people. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003).

The need for certainty and reliability is particularly true for the type of non-compete and non-disclosure agreements involved in this case. In many circumstances, cooperative arrangements involve disclosure of confidential information that has considerable value and significant benefit for businesses, and conversely, the risk of substantial detriment and harm if used by competitors. Understandably, businesses want to protect their interests through agreements with the other companies and individuals involved in their operations. Businesses must be able to trust that their contracts will be enforced before they can have sufficient confidence to disclose the critical information needed to carry out their plans.

The approach used by the Court of Appeals to invalidate the agreements in this case undermines the needed assurance that businesses can protect their interests through contracts. Businesses will face the risk that courts may look at contracts in hindsight, and decide that their judgments about how to best accomplish their goals were not the right choices. A court could determine that an agreement reached between two businesses to advance and protect their respective interests should not be enforced. As in this case, a court could decide after the fact that a party's exercise of its rights under a contract caused the valid consideration supporting non-compete and non-disclosure agreements to fail.

The Chamber recognizes that contracts between employers and employees have sometimes been treated differently by the legislature and courts. There is no need to debate those differences, however, because they are not at issue here. This case involves sophisticated businesses entering into contractual relationships with their eyes open. The parties are businesses that knowingly agreed to specific terms based on judgments about the best way to reach their objectives.

ARGUMENT

I. A party's exercise of its rights under an agreement cannot result in a failure of consideration and render other contract provisions unenforceable.

The Chamber believes that the Court of Appeals misapplied the failure of consideration doctrine to invalidate the non-disclosure and non-compete agreements between Innovation Ventures and K & L Development.¹

When structuring their business relationship, the companies contemporaneously negotiated two related agreements. [Apx 76a-92a; 94a-99a] K & L Development agreed that it would protect the confidentiality of certain information, would not disclose the information to other persons, and would not compete with Innovation Ventures during the term of the agreement and for three years afterwards. [Apx 82a-83a; 94a-95a, 97a] K & L Development and Innovation Ventures agreed that either could terminate the equipment manufacturing agreement at its sole discretion and without cause upon 14 days' notice. [Apx 83a-84a] The nondisclosure agreement did not have a specific term, and therefore, was terminable at will by either party. *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 240-241; 324 NW2d 732 (1982). Both companies knew that their business relationships could end at any time.

A. Failure of consideration cannot be based on an event that was contemplated by the parties and governed by an agreed upon provision in their contract.

The Court of Appeals correctly held there was valid consideration supporting the agreements. "[M]ere continuation of employment is sufficient consideration to support a

¹ Andrew Krause, the president and owner of K & L Development, was a party to one of the agreements. For convenience, this brief uses "K & L Development" to refer to both Krause and his company.

noncompete agreement in an at-will employment setting.” Opinion, p. 10 (quoting *QIS, Inc v Indus Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004)).² While the agreements in this case did not involve employment, the principle is sound and applies in other contexts. See, *Adell Broad Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12; 708 NW2d 778 (2005)(continuation of business relationship is consideration). The holding that there was adequate consideration should have ended the inquiry. *Levitz v Capitol Sav & Loan Co*, 267 Mich 92, 97; 255 NW 166 (1934)(“The law does not inquire into the adequacy of the consideration.”); *GMC v Dep’t of Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002)(“Courts do not generally inquire into the sufficiency of consideration.”)

The Court of Appeals, however, departed from this well-settled rule and instead found a “failure of consideration” based on Innovation Ventures’ exercise of rights granted in valid agreements that were supported by sufficient consideration. Beyond violating the “fundamental tenet of our jurisprudence” that respects the parties’ freedom to manage their own affairs, *Rory*, 473 Mich at 468, the court misapplied the failure of consideration doctrine.

To be fair, other courts have confused the failure of consideration defense as well, blurring it with lack of consideration, impossibility or frustration of performance, first material breach, and other contract principles. “[T]he term is misleading in that it really refers to a failure of *performance*.” *Adell*, 269 Mich App at 13 (emphasis in original; citing *Black’s Law Dictionary* (8th ed)). Indeed, the Restatement has jettisoned the term “failure

² A majority of jurisdictions adhere to the same rule and “hold that continued employment alone is sufficient consideration to support a covenant not to compete entered into after the commencement of an at-will employment relationship.” *Summits 7, Inc v Kelly*, 178 Vt 396; 886 A2d 365, 370 (2005).

of consideration” in favor of the more accurate “failure of performance.” Restatement Contracts 2d, § 237 cmt a (“What is sometimes referred to as ‘failure of consideration’ by courts and statutes . . . is referred to in this Restatement as ‘failure of performance’ to avoid confusion with the absence of consideration.”).³

Failure of consideration can result when a party’s “breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible.” *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964). See also, *Sharrar v Wayne Sav Ass’n*, 246 Mich 225, 229; 224 NW 379 (1929). “[R]escission is permissible when there is failure to perform a substantial part of the contract or one of its essential items, or *where ‘the contract would not have been made if default in that particular had been expected or contemplated.’*” *Rosenthal v Triangle Development Co*, 261 Mich 462, 463; 246 NW 182 (1933) (emphasis added; internal citation omitted). Failure of consideration may occur when “the thing expected to be received by one party and given by the other party cannot

³ “A party asserting the defense of failure of consideration is not really arguing that the contract lacks the necessary bargained for exchange. Rather, the party contends that his adversary has failed to perform her obligation under the contract. If the breach or failure to perform goes to the essence of the agreement, the adversary cannot sue to enforce the contract.” *Zemco Mfg, Inc v Navistar Int’l Transp Corp*, 270 F3d 1117, 1121 n 3 (CA 7, 2001).

K & L Development confuses lack of consideration with failure of consideration. It cites *Simko, Inc v Graymar Co*, 55 Md App 561; 464 A2d 1104, 1107-1108 (1983), which held that a non-compete provision was unenforceable based on failure of consideration. In a footnote, K & L Development asserts that “[m]any other jurisdictions agree,” citing *Labriola v Pollard Group, Inc*, 152 Wash 2d 828, 838; 100 P3d 791, 796 (2004). [Defendants’ brief, p. 34 & n 13] However, *Labriola* and the other cases cited in the footnote discuss lack of consideration, holding that independent consideration is required to support a non-compete provision signed after employment has begun. Michigan has expressly rejected this rule. *QIS, Inc*, 262 Mich App at 594.

be or has not been given without fault of the party contracting to give it.” *Adell*, 269 Mich App at 13-14 (citing Black’s Law Dictionary (5th ed)).

Rosenthal demonstrates the basic error in the Court of Appeals’ application of the doctrine. The consideration accepted by the parties does not “fail” when an event occurs that was “expected or contemplated” and addressed in the contract. 261 Mich at 463. In that circumstance, there is no “failure of consideration” or “failure of performance.” Instead, the contract is enforced according to the terms agreed by the parties who knew and accepted the risk that a desired event might not come to pass.

This critical principle was applied in *Sunday v Novi Equipment Co*, 290 Mich 539; 287 NW 909 (1939). An inventor granted a license for manufacture, use, and sale of a heater. When the contract was executed, the inventor’s patent application was pending. The manufacturer produced the heater and paid royalties while the U.S. Patent Office reviewed the application. The manufacturer refused to pay royalties after the patent was denied, leading to the litigation. This Court rejected the manufacturer’s argument that “denial of the patent constituted failure of consideration for the contract, at least as to royalties which accrued subsequent to such denial.” *Id.* at 546.

It is important to bear in mind that this license contract was not entered into under a claim of the licensor that a valid patent had theretofore been issued. In such a case it might well be urged that subsequent cancellation of the patent would constitute failure of consideration In the instant case *all parties concerned knew at the time the license contract was executed that [the inventor] had not yet obtained a patent* but instead his application for a patent was being made simultaneously. It is a fair inference from the record that *all parties concerned knew it was uncertain whether a patent could or would be obtained. . . . Id.* at 546-547 (emphasis added; internal citation omitted).

In this case, K & L Development knew that Innovation Ventures had not committed to continuing the business relationship for any specific period. When entering into the contract, the parties expressly understood and unambiguously agreed that either could terminate their relationship for any reason. They also knew the agreements could be terminated at any time, and specifically, could be terminated shortly after they were signed.

In their briefs, the parties disagree about when the notice terminating the equipment manufacturing agreement was sent. [Defendants' brief, p. 6 (13 days after signing); Plaintiff's brief, p. 9 n. 1 (sometime later in May 2009)] But the factual dispute does not matter to the legal principle used by the Court of Appeals as the basis for holding the non-compete and non-disclosure provisions unenforceable. The question is not whether Innovation Ventures breached the equipment manufacturing agreement by failing to give notice at least 14 days before termination. The issue is whether exercising a provision accepted by the contracting parties can result in failure of consideration.⁴

The Court of Appeals is wrong when stating K & L Development "never received that which they were promised under the agreements." [Opinion, p. 11] To the contrary, both parties received what they agreed to—a contract with the possibility of an ongoing business relationship subject to termination at any time.

⁴ No notice was required before terminating the nondisclosure agreement. *Lichnovsky*, 414 Mich at 240-241.

Under the equipment manufacturing agreement, a one-day shortfall in the required 14-day notice does not appear to be a material breach, and in any event, could not amount to the "failure to perform a substantial part of the contract or one of its essential items" that is required for failure of consideration. *Rosenthal*, 261 Mich at 463.

B. A court should not use failure of consideration to protect a party against the consequences of contract terms it knowingly accepted.

Failure of consideration cannot be used to rescind a contract because a court believes it would be unfair to enforce a contract due to a later event that the parties knew about and addressed when reaching their agreement.

The Court of Appeals followed a judicially devised principle applied in some states to non-compete provisions in at-will employment contracts. These cases express concern about “the illusory nature of the promise of continued employment in an at-will relationship.” The employer can still fire the employee without cause while the employee’s situation “has dramatically changed in that the employee’s ability to leave and pursue the same line of work with a new employer is significantly restricted.” *Summits 7, Inc v Kelly*, 178 Vt 396; 886 A2d 365, 370-371 (2005) (discussing cases). To remedy the perceived unfairness of enforcing the contract terms, some courts require that employment must continue for a substantial time to suffice as adequate consideration. *Id.* at 371.

Whether these concerns in an employer-employee context are grounds for an exception to the general rule requiring respect for the parties contracts is not a question presented by this case.⁵ The Court of Appeals incorrectly stated that Innovation Ventures “employed defendants Krause and K & L on an at-will basis” and, as consideration, “would forgo its right to immediately terminate the *employment relationship* in exchange for defendants signing” the two agreements. [Opinion, p. 11 (emphasis added)] The parties agree that the Court of Appeals was wrong about the nature of their relationship. Neither

⁵ However, “[o]ne should not think such cases of deceit common. Employers pay a price if they get a reputation for tricky dealings with their employees.” *Curtis 1000 v Suess*, 24 F3d 941, 946 (CA 7, 1994)(Posner, J.)

K & L Development nor Krause was employed by Innovation Ventures. [Plaintiff's brief, p. 29; Defendants' brief, p. 33] Accordingly, the out-of-state cases followed by the Court of Appeals are not applicable.

From the Chamber's perspective, however, the error by the Court of Appeals is more serious than a mistaken understanding of the parties' relationship. The court held that the agreements were not enforceable "[w]here [Innovation Ventures] terminated the business relationship within two weeks after the agreements were signed" *Id.* The court ruled that failure of consideration resulted when Innovation Ventures terminated the agreements according to the terms accepted by K & L Development and Krause. The consideration for the contracts failed, according to the Court of Appeals, because one party exercised a right expressly and unambiguously granted by the parties' mutual agreement. Under this reasoning, Innovation Ventures rendered the contract unenforceable by doing what the contract allowed. That result cannot be reconciled with basic contract law principles.

Any business looks at the potential benefits and risks when considering a contractual arrangement with another individual or company. K & L Development presumably contemplated the possible "worst-case scenario," where it would agree to various terms, including the non-compete and non-disclosure provisions, but not obtain the hoped-for business because Innovation Ventures decided to look elsewhere. K & L Development could have tried to negotiate with Innovation Ventures for appropriate terms to protect against that scenario. But it did not. Instead, K & L Development decided to accept the non-disclosure and non-compete provisions, among many other contractual

terms, knowing that Innovation Ventures had the option to terminate the agreements at its discretion at any time.

In hindsight, K & L Development may have made a poor decision. However, it was K & L Development's decision to make, and not one to be second-guessed and retroactively changed by a court. The option of making a bad decision is an inherent aspect of the "freedom of individuals freely to arrange their affairs via contract." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). The "substantial time" requirement adopted by the Court of Appeals is a thinly veiled effort to protect K & L Development against the consequences of enforcing the unambiguous terms of its agreements with Innovation Ventures. However, courts lack authority to "rebalance the contractual equities," *Rory*, 473 Mich at 461, and cannot rewrite a contract to relieve a party of the harsh consequences of enforcing its terms. *Balogh v Supreme Forest Woodmen Circle*, 284 Mich 700, 707; 280 NW 83 (1938). "The courts' willingness to depart in this area from the traditional refusal to inquire into the adequacy of consideration," *Curtis 1000 v Suess*, 24 F3d 941, 946 (CA 7, 1994)(Posner, J.), is nothing more than a decision to not enforce the parties' contracts as written.⁶

The Chamber acknowledges the concerns raised by the out-of-state cases cited by the Court of Appeals. However, adhering to the fundamental tenet that contracts should be enforced as written does not leave a party as helpless prey if the other party is dishonest. There are ample remedies for a party to a contract who is harmed when the other party

⁶ See, 15-80 Corbin on Contracts § 80.23 (requirement of continued employment for substantial duration is "certainly foreign to other areas of contract law"; "backward-looking analysis" does not "follow[] traditional notions of consideration"); 2-6 Corbin on Contracts § 6.19 ("These are not questions that engage the doctrine of consideration.").

takes unfair advantage or engages in wrongful conduct. A party can rescind a contract entered under duress or through coercion. *Lafayette Dramatic Productions, Inc v Ferentz*, 305 Mich 193, 215-218; 9 NW2d 57 (1943). If a party secures a non-compete provision by false representations about continued employment or future business, the other party can assert fraudulent inducement. *Kefuss v Whitley*, 220 Mich 67, 82-83; 189 NW 76 (1922).

K & L Development argues that the agreements with Innovation Ventures “were a sham, and were offered in bad faith.” [Defendants’ brief, p. 34] As amicus, the Chamber takes no position on those fact-dependent allegations. However, the Court of Appeals did not hold, as K & L Development asserts, that “a party cannot present an anti-competition agreement to another party in bad faith.” [*Id.*] The court made no such holding, and its rationale for invalidating the parties’ agreements did not depend in any way on the existence of bad faith. The court concluded that “the discontinuation of the business/employment relationship within two weeks of the signing of the agreements constituted a failure of consideration.” Opinion, p. 10. The Court of Appeals held that “plaintiff’s forbearance in terminating the relationship amounted to a nullity” when “plaintiff terminated the business relationship within two weeks after the agreements were signed.” *Id.* at 11.

If this case only presented fact-based questions about the parties’ intentions, the Chamber would not be so concerned, and indeed, would have little interest in a private contractual dispute. The Court of Appeals, however, did not invalidate the agreement because Innovation Ventures acted in bad faith. The court held the provisions were unenforceable because Innovation Ventures exercised the right to terminate that was explicitly and unambiguously granted by the parties’ contract.

C. Courts should not inject uncertainty into unambiguous contracts.

The Chamber believes that the Court of Appeals' decision infects business relationships with an unacceptable degree of uncertainty. The court found a failure of consideration because the business relationship ended two weeks after the agreements were signed. [Opinion, pp. 11-12] The court contrasted the situation to the one considered in *Adell Broad Corp*, 269 Mich App 6. In *Adell*, a television station and its media representative modified their existing agreement in an effort to resolve disputes over unpaid commissions. The new agreement, which satisfied the debt by partial payment and reduced future commission rates, had a 30-day termination provision. The renewed relationship ended after two months. *Adell* held there was no failure of consideration. *Id.* at 14.

The uncertainty resulting from the Court of Appeals decision is evident from comparing the decisions in this case and *Adell*. It may be that two months is long enough while two weeks is too short. Or it may not be enough to look at how long a business relationship continues after an agreement is signed, at least according to the out-of-state cases cited by the Court of Appeals. The Tennessee Supreme Court says "[i]t is possible . . . that employment for only a short period of time would be insufficient consideration under the circumstances." *Central Adjustment Bureau, Inc v Ingram*, 678 SW2d 28, 35 (Tenn 1984). The answer, however, "depends upon the facts and circumstances of each case." *Id.* The Vermont Supreme Court focuses on a different question, finding legitimate consideration "as long as the employer does not act in bad faith by terminating the employee shortly after the employee signs the covenant." *Summits* 7, 886 A2d at 405. Maryland looks at whether an employee is discharged "in an unconscionably short length

of time” and whether the employer “extracted the employee’s signature . . . through a threat of discharge.” *Simko, Inc v Graymar Co*, 55 Md App 561; 464 A2d 1104, 1107-1108 (1983). The only state with a somewhat defined time requirement is Illinois, but even then, two years or more is only “generally held” to be sufficient. *Brown & Brown, Inc v Mudron*, 379 Ill App 3d 724; 887 NE2d 437, 441 (2008).

The Chamber believes it would be unwise and unworkable to judicially engraft an ill-defined “substantial period” requirement on an agreement between two businesses that contains an unambiguous termination provision. A business should not be forced to face the uncertain prospect of judicial hindsight when deciding how to contractually manage a business relationship with another company. Rather, a business should be able to make its own decisions by choosing the right partners and negotiating mutually acceptable terms. There is always some level of risk whenever a business discloses its valuable confidential information to others. It should not face an added risk that a court might later decide that the parties’ agreement was not the right one.

While this case involves non-compete and non-disclosure provisions, nothing in the Court of Appeals’ reasoning limits its decision to that context. Any contract that ends earlier than one party hoped—or a court thought it should last—could be invalidated even if terminated according to its express provisions. For example, an individual or business in Michigan may decide that the prospect of continued dealings with a company in a distant state is worth accepting choice-of-law or forum-selection clauses. From the other perspective, the out-of-state company may view those provisions as critical, wanting the familiarity of its state’s law or the protection against the cost of litigating in another state. Other provisions may be important to a party’s willingness to contract—an arbitration

clause, an attorney fee provision, or an indemnification agreement. Individuals and companies in other states may be reluctant to do business in Michigan if a decision to terminate an agreement according to its terms could result in losing the benefit of important contractual rights.

CONCLUSION

In this case, a party did what was unambiguously allowed under the contract terms. The result, according to the Court of Appeals, was a failure of consideration that rendered the contract unenforceable. If the risk and uncertainty created by that ruling prevails, the Chamber is concerned that individuals and companies will be reluctant to enter into the arrangements necessary to carry on business in Michigan.

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Amicus Curiae
Michigan Chamber of Commerce

/s/ Richard C. Kraus
Richard C. Kraus (P27553)
David R. Russell (P68568)
313 S. Washington Square
Lansing, MI 49833-2193
(517) 371-8104

December 22, 2015

28085:00002:2447004-1